Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1977
No. 77-101

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors,

KARL CUNNINGHAM and JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM, DIANE MARIE CUNNINGHAM and KAREN KAY CUNNINGHAM, minors,

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors,

JOHN H. WHITE and NORMA WHITE, his wife, suing in their own right and as parents and natural guardians of NATALIE WHITE and STEPHANIE WHITE, minors,

WILLIAM VISS and CHARLOTTE VISS, his wife, suing in their own right and as parents and natural guardians of STANLEY VISS, CAROL VISS and JONATHAN VISS, minors,

Petitioners

vs.

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRAEL PACKELL, Attorney General; of the Commonwealth of Pennsylvania

and

HAROLD MARTIN, STEVEN RHODES, ROBERT VEON, HARRY FRY, RONALD STURM, PETER DeCARO, BOB HAGEN, JOHN RUKAS and DOM CASEY and their successors in office, Directors of Big Beaver Falls Area School District

and

LeROY STEWART, ROBERT CAUGHNER, DAVID GROPP, AMELIA FUSCO, ROBERT AMALIA, ROBERT BERNHARDY, WILLIAM LIEBERMAN, WILLIAM G. DANNELS and BILLIE WALLACE and their successors in office, Directors of Blackhawk School District

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Now Come Plaintiffs-Appellants in the captioned matter and, pursuant to Rule 23, petition Your Honorable Court to issue a Writ of Certiorari herein upon the following grounds:

(a) OPINION BELOW

This writ is sought from the Order of the Court of Appeals for Third Circuit entered on the 19th day of April, 1977 by Judges Aldisert, Garth and Stapleton, a copy of which is appended hereto pursuant to rule.

(b) JURISDICTIONAL GROUNDS

(i) The judgment concerning which review is sought was entered on the 19th day of April, 1977.

(ii) No rehearing on extensions of time have been sought herein.

(iii) Your Honorable Court has power to issue the writ prayed for by virtue of Act of June 25, 1948, C.646 §1, 62 Stat. 928, 28 USCS §1254.

(c) QUESTIONS PRESENTED FOR REVIEW

(1) Where a complaint in equity by federal citizens raises claims of state action in infringement of their rights under the First and Fourteenth Amendments and seeks prospective participation in a state public welfare fund as a remedy, does the doctrine of sovereign immunity bar such a claim? *(Answered in the negative.)*

(2) Where such a complaint is filed initially against "Commonwealth of Pennsylvania" "Big Beaver Falls School District" and "Blackhawk School District", is its dismissal on sovereign immunity grounds res judicata to a second action by the same plaintiffs raising identical constitutional issues but filed against named office holders of the Commonwealth and individual Board members of the districts? (*Answered by Appellants in the negative.*)

(3) Does an allegation by federal citizens that state schools have established a "religion of humanism" by taxation which plaintiffs by compulsion pay and in which they are denied participation because of their exercise of their religious conviction raise a substantive federal question under the First and Fourteenth Amendments to the United States Constitution and the provisions of 28 USC 1331, et seq.; 28 USC 2201 et seq.; 28 USC 1343 (3) (4) ? *(Answered by Appellants in the affirmative.)*

(4) Where appellants have alleged that state action in excluding them from equal participation in an ex-

isting public welfare fund because of their exercise of First and Fourteenth Amendment rights in securing non-state education for their children constitutes a pressing burden on that exercise of right, and where appellees have procedurally admitted the factual allegations underlying the constitutional grievance by filing motions to dismiss, are appellants entitled to a trial on the issues raised? *(Answered by appellants in the affirmative.)*

(5) Where it is alleged and procedurally admitted by motions to dismiss that the Pennsylvania Constitution and School Code (as cited hereafter) operate to compel appellants to choose between either:

1. Accepting "public" school education in order to avail themselves of said public welfare school tax funds, in violation of their religious convictions on the one hand, or:

2. Maintaining their religious faith by foregoing their rightful share in said public tax monies and purchasing education at added cost while still paying public school tax on the other, in violation of the same religious convictions,

is a question of infringement by state action of First Amendment rights thereby raised? *(Answered in the affirmative.)*

(d) STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Appellants' contentions involve the following statutory or constitutional provisions:

(i) Provisions of the Pennsylvania School Code; 24 Purdon's Statutes §2-213, 6-602, 6-603, 6-610, 6-652, 6-674, 6-679, 6-680 and 6-686. (See Appendix p. 48a.)

(ii) The Constitution of the Commonwealth of Pennsylvania, Art. III, Section B-15:

PUBLIC SCHOOL MONEY NOT AVAILABLE TO SECTARIAN SCHOOLS. Section 15. No money raised for the support of the Public Schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

(iii) Provisions of the Pennsylvania "Tax Act of 1963 for Education." 1956, March 6, P.L. (1955) 1228, 72 Purdon's Statutes 3402-201 et seq.

§3403—201. Imposition of tax

(a) There is hereby imposed upon each separate sale at retail as defined herein within this Commonwealth a tax of five (5) per cent of the purchase price, which tax shall be collected by the vendor from the purchaser, and shall be paid over to the Commonwealth as herein provided.

(b) There is hereby imposed upon the use, on and after the effective date of this act, within this Commonwealth of tangible personal property purchased at retail on or after March 7, 1956, and on those services described herein purchased at retail on and after April 15, 1959, a tax of five (5) per cent of the purchase price, which tax shall be paid to the Commonwealth by the person who makes such use

as herein provided, except that such tax shall not be paid to the Commonwealth by such person where he has paid the tax imposed by subsection (a) of this section or has paid the tax imposed by this subsection (b) to the vendor with respect to such use. The tax at the rate of five (5) per cent imposed by this subsection shall not be deemed applicable where the tax has been incurred at the rate of three per cent or three and one-half per cent or four percent under this subsection prior to this amendment.

(c) Notwithstanding any other provisions of this act, the tax with respect to intrastate telephone service and intrastate telegraph service within the meaning of clause (*l*.1) of section 2 of this act shall, except for telegrams paid for in cash at telegraph offices, be computed at the rate of five (5) percent upon the total amount billed to customers periodically for such services, irrespective of whether such billing is based upon a flat rate or upon a message unit charge. 1956, March 6, P.L. (1955) 1228, art. II, §201, added 1956, May 24, P.L. (1955) 1707, §5, as amended 1959, April 15, P.L. 20, §3; 1959, June 9, P.L. 461, §1; 1959, Aug. 20, P.L. 729, §8; 1959, Nov. 21, P.L. 1556, §10; 1963, May 29, P.L. 49, §7.

§3403—604.1 Disposition of proceeds.

All taxes collected under the provisions of this act as amended shall be used for purposes of public education in so far as permitted by the requirements of the Constitution of Pennsylvania. 1956, March 6, P.L. (1955) 1228, art. VI, §604.1, added 1959, April 15, P.L. 20, §12, as amended 1963, May 29, P.L. 49, §18.

(e) (f) (g) STAGE OF PROCEEDING

Appellants filed suit in Equity in the U.S. District Court for the Western District of Pennsylvania on October 30, 1975 praying for appointment of a 3 Judge Court under 28 USCA §2281 et seq. to hear allegations of infringement of First and Fourteenth Amendment Rights and claiming jurisdiction under 28 USC §1331 et seq.; 28 USC §2201 et seq.; 28 USC 1343(3), (4) as amended. Appellees filed motions to dismiss which were granted by opinion and order of Miller, J. on April 26, 1976. Appeal to the Court of Appeals for the Third Circuit followed, and on April 18, 1977 the Third Circuit affirmed the ruling of the District Court.

(h) ARGUMENTS FOR ALLOWANCE OF WRIT

(1) Fundamentally, the writ must issue because appellants are *being denied access to the Courts* for trial on issues which this Court has time and again perceived to be *"a highly sensitive constitutional area", Sherbert v. Verner,* 374 U.S. 398, p. 406. The allowing of appellants' claim will only give them a day in court; a *chance to prove* their claim. If this access is denied them, what right have the courts to hold themselves out as a forum for the peaceable adjustment of grievances?

(2) If anything the gravamen of the complaint is heightened by its constitutional base on which plaintiffs claim to be the victims of an economic classification resting on *religious grounds which have been vindicated by this court* in *Pierce* and *Yoder;* to wit; the *religious* freedom to select non-state schooling for their children without being "hampered:" (*Everson*, p. 16) or handicapped (*Schempp*). The Court itself has summarized the critical nature of these—as yet unheard—claims in the following language:

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."
>
> (*Wisconsin v. Yoder,* 406 U.S. 205, 216.)

(3) Legal questions arising from the nexes between state welfare funding and non-state education and parents' rights concerning the education of their children have involved a major part of the Court's caseload in recent years.[1] But none of these cases have *merged* these legal questions, to wit:

1. Parents' rights to select non-state education for their children. (*Pierce-Yoder*)

2. Parents' standing as taxpayers to participate in public welfare funds.[2]

3. The nature of religion and the value system of the state schools as reflecting religious values.[3]

4. The legal consequences of a citizen being excluded from the benefits of a public welfare fund by virtue of his exercise of the right to opt for non-state schooling for his children.[4]

Thus appellants have raised most serious questions of Federal law as yet unresolved by our courts, yet which arise implicitly from positive law set down in the cases referred to, supra. That First Amendment decisions are not "fungi-

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[1] *Everson v. Board of Education,* 330 U.S. 1 (1947), 67 S.Ct. 504; *Alton J. Lemon et al. v. David H. Kurtzman,* 403 U.S. 602 (1971); *Board of Education v. Allen,* 392 U.S. 236 (1968); *Sylvia Meek et al. v. John C. Pittenger* (1975), 43 L.W. 4596; *Wisconsin v. Yoder,* 406 U.S. 205; *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

[2] See: *Sherbert v. Verner,* 374 U.S. 398; *Graham v. Richardson,* 403 U.S. 365 (1971); *Shapiro v. Thompson,* 394 U.S. 633 (1968).

[3] *Torcaso v. Watkins,* 367 U.S. 488 (1961); *U.S. v. Seeger,* 380 U.S. 163 (1965); *Welsh v. U.S.,* 398 U.S. 333 (1970).

[4] *Sherbert, Graham, Shapiro,* supra; *Elrod v. Burns* infra.

bles" is recognized, yet it still remains true that the base of all First Amendment claims rests in the life of the Federal citizen as his constitutionally preserved freedoms move to expression in his various daily concerns whether they be employment (*Sherbert; Elrod v. Burns,* —— U.S. ——, 49 L.Ed. 2d 547, 96 S.Ct. —— (1976)) education (*Yoder*) politics (*Elrod*) or interstate travel (*Graham, Shapiro*).

(4) A new dimension of Federal law significance is reached in appellants' cause by the allegation, *procedurally admitted,* that appellees have established a religion of secular values in their schools. This allegation is new to the courts but not to the public media [5] or to appel-

[5] "National Courier, September 3, 1976: Secular Humanism: The Last Bell Rings By Bill Willoughby National Courier Correspondent: Washington—The House of Representatives has approved an amendment to the National Defense Education Act which could have profound effects in curbing the infusion of secular humanism in public school courses.

The amendment prohibits the Federal Government from authorizing grants, contracts, or support for educational programs, curriculum research and development, administrator and teacher orientation, and other projects involving any aspect of the religion of secular humanism.

Representative John Conlan, Republican of Arizona, had also previously introduced a similar amendment to a National Science Foundation spending bill, but it was narrowly defeated. The Foundation has funded the development of many of the textbooks and courses which have been protested by parents' groups.

Mr. Conlan said his amendment is a legislative and constitutional necessity because it touches at the heart of academic freedom.

lees' schools themselves. For example a text employed by Blackhawk School District calls for orderliness of internal social change in the following language: [6]

> "The internal change must arise from the development of a faith which should give meaning and purpose to living but which *could be believed in by a reasonable man familiar with what we have learned of our world by scientific methods.* As wide an induction as anthropology can offer is that every society desperately needs morality in the sense of common standards, and religion in the sense of orientations toward such inescapable problems as death, individual responsibility, and other ultimate value attitudes. Religion in this sense is absolutely necessary to promote social solidarity and individual security by affirming and symbolically enacting a system of common purposes. In my opinion, a faith is required which would not force intellectual reserva-

The concept of academic freedom has been virtually destroyed in some circles, he added, by the false assumption that the secular humanist stance is religiously neutral.

Mr. Conlan believes nothing could be further from the truth. He cites a 1961 Supreme Court case (Torcaso v. Watkins) which held that secular humanism is a religion.

'Secular humanism declares that there is no God, that man is his own god,' Mr. Conlan said. 'Educators advocating a secular humanist view consistently exclude from the classroom any teaching of moral and ethical principles based on the Judeo-Christian belief in God.'"

[6] *Mirror for Man* by Clyde Kluckhohn, Whittlesey House, McGraw Hill Book Company Inc., New York, p. 282.

> tion or conflict or compartmentalization. Such a faith cannot today, I believe, successfully be based upon supernatural premises. It must needs be a secular religion. There is nothing whatsoever in the sciences of human behavior which denies the existence of 'absolutes' in and for human conduct. However, a humanistic science does assert that these absolutes can and must be validated by empirical observation rather than by documents pretending to supernatural authority."

This patent call for secular religion must evoke the Court's concern for its impact on the highly valued freedoms of appellants in the interest of their children as detailed in paragraphs 17, 18, and 19 of the complaint; and it should —*must*—be emphasized here that appellants seek only a day in court; a forum; a *chance* to competently prove their claims. The violence done to them is that the doors of the Court to this juncture have been slammed in their faces. If truth fears no inquiry, then the educational "system" espoused by government should fear no examination, and the courts, most of all, should not stoop to excavate escape routes for that same system when it is faced with jural inquiry.

(5) The opinion of the Third Circuit conflicts with applicable decisions in several areas.

(i) The Eleventh Amendment Cases:

The opinion disputed by this petition holds that the prior dismissal of the action was warranted under the 11th Amendment:

> "After careful and thorough analysis, the district court in the prior action determined that the

> claim was barred by sovereign immunity, and we affirmed that determination. The 'essential nature and effect' of the present proceeding is identical to that of the prior action. The prior determination therefore, continues to control."

However, this reasoning wholly misses appellants' prayer for relief in the light of *Edelman v. Jordan,* 415 U.S. 651, 39 L.Ed. 2d 662 (1974). The complaint seeks only equal per capita distribution of the school tax fund—a fortiori an *existing* fund; an *existing* appropriation. No additional appropriation need be made to effect an equal distribution of that which already exists. Here *Edelman* becomes apposite. Here the court upheld, a District Court decree awarding prospective relief in reliance upon *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), noting that (p. 667):

> "The injunction issued in *Ex Parte Young* was not totally without effect on the state's revenues, . . ."

Proceeding to view a line of "welfare" cases the Court observed at p. 668:

> "But the fiscal consequences to State Treasures in these cases (*Graham v. Richardson,* 403 U.S. 365 (1971), and *Goldberg v. Kelly,* 397 U.S. 254 (1970)) were the necessary result of compliance with decrees which by their terms were *prospective in nature.*" (Emphasis supplied.)

Hence, when appellants seek *prospective* participation in a tax fund under equity jurisdiction the prospective nature of the relief finds sanction against 11th Amendment

strictures under *Ex Parte Young, Graham v. Richardson, Goldberg v. Kelly,* and *Thompson v. Shapiro,* 397 U.S. 168 (1969).

Thus the court missed the point of its own cited authority:

> "It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. *Edelman v. Jordan,* 415 U.S. 651 (1974); *Poindexter v. Greenhow,* 114 U.S. 270, 287 (1885); *Cunningham v. Macon & Brunswick R. Co.,* 109 U.S. 446 (1883). Its applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'" *Ex Parte New York,* 256 U.S. 490, 500 (1921).

precisely because it failed to consider the *essential nature and effect of the proceeding,* to wit; prospective participation in an existing fund.

(ii) Relief Flowing From Substantive Federal Rights:

However, the argument does not rest here alone, for a deeper and more important perception than the prospective retroactive distinction was made in *Edelman.* The portion of the District Court's opinion in *Edelman* that was reversed:

> ". . . requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation . . ." (p. 668) which

> is: "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."

Hence, by negative inference, where a substantive federal question is adjudicated, future compliance with the adjudication may require "fiscal consequences" of state treasures, while a recovery for breach of duty may remain barred. Obviously, appellants' cause is both substantive and federal, thus escaping the post-*Young* strictures.

The last point appellants urge in seeking consideration of their case is that if the issue may be reached despite *Edelman,* sovereign immunity is waived by terms of the Pennsylvania Public School Code of 1949:

> "§2-213
>
> Each school district shall have the right to sue and be sued in its corporate name. Any legal process against any school district shall be served on the president or secretary of its board of school directors, 1949, March 10, P.L. 30, Art. II §213, 24 P.S. §2-213."

(iii) Appellants Seek Religious Freedom—a Substantive Federal Question:

At this point it becomes vital to see that appellants' case is not a "tax" case, nor even an economic case, but at root is a matter of free exercise of religious freedom; the economic side of the case is the burden complained of, not the root freedom expressed. This section will therefore develop the constitutional decisional base of that free-

dom, for the decision complained of conflicts implicitly with the "free exercise" cases.

The Meaning of Religion

To Plaintiffs in this action "religion" means much more than that which transpires inside a house of worship. Most simply, in Plaintiffs' eyes, religion is synonymous with "world view" or "value system". Hence, any educational process that deals with the nature of man and his surrounding circumstances carries with it deeply religious values as to man's identity and purpose. The conflict between Plaintiffs' Christian world view and that taught in Defendants' schools is summarized in paragraph 21 of the complaint (see Appendix, pp. 8a-9a). Defendants have procedurally admitted these allegations, so that on the present posture of the case the following (as summarized from the complaint) may be deemed admitted:

I. That plaintiffs are compelled to support the educational institutions of defendants. Paragraphs 12, 13, 14, 15.

II. That plaintiffs pay additional educational costs for their children to attend certain Christian day schools. Paragraph 16.

III. That plaintiffs' religious convictions as Christians impel them to "raise their children in the nurture and admonition of the Lord" which includes formal education in Christian day schools. Paragraphs 17, 18.

IV. That plaintiffs' religious faith commits them to a Christian world view in light of which "no

truth, teaching, fact or educational philosophy" can be neutral. Paragraph 19.

V. That defendants' operations are, in toto, dominated by the religious philosophy of secularism or secular humanism which is "hostile to and diametrically opposed to" the religion of plaintiffs. Paragraphs 20, 21, 22, 24.

VI. That the defendants' schools are religiously closed to the plaintiffs; that plaintiffs' religious sensibilities are done violence by the compulsion to support defendants' operations when coupled with the absence of equitable return from the public welfare fund to which they (under compulsion) contribute. Paragraphs 22, 23, 25.

VII. That defendants' taxing and educational policies constitute an immediate impairment of plaintiffs' exercise of religion and parental rights in the religious instructions of their children. Paragraphs 25, 26, 27.

On this state of the record, then the religious conflict over the state's educational values and those of the Plaintiffs is patent. Query: Does Plaintiffs' more expansive view of religion remain under the protection of the free-exercise clause?

First, Plaintiffs are not in court to convince the Court of the truth of their world view as an Evangelist might do, but rather to maintain their liberty to instruct their children in the Christian world view. Hence the Court's ruling in *U.S. v. Ballard,* 322 U.S. 78, preserves Plaintiffs' right to believe as they do free of restraint or opposition by government.

Second, the Court itself has seen that religious values and religion are not solely theistic or restricted to the grounds of the cathedral. In *Torcaso v. Watkins,* 367 U.S. 488 (1961), the Court vindicated the freedom of Torcaso to hold political office free of imposition of a governmentally required belief in God and in footnote 11 (p. 495) noted:

> "Among religions in the country which do not teach what would be generally considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."

This must have the force of holding, else Torcaso's unbelief, or belief in *another* value system, would not be protected under the free exercise clause. Hence "secular" values can have the force of either religious freedom or religious oppression.

In another series of cases the court has perceived a broader scope to religion than that traditionally afforded it. In *U.S. v. Seeger,* 380 U.S. 163 (1965), and later in *Welsh v. U.S.,* 398 U.S. 333 (1970), the court was confronted with the question of whether or not the theistically phrased conscience clause of the draft laws also operated to exempt from military service those who had qualms of conscience toward taking of human life on non-theistic grounds. In these cases the court held that a deeply-held value system was the equivalent of the more traditional theistic conception of the term religion:

> "Because his beliefs function as a religion in his life." (*Welsh,* p. 340)

> "A sincere and meaningful belief which occupies in the life of its possessor a place *parallel to that filled by the God of those admittedly qualifying* for the exemption comes within the statutory definition". (*Seeger,* p. 176)

Hence, Plaintiffs' religious conviction that education is also a religious matter finds sanction under *Ballard,* supra, and support under *Torcaso, Seeger* and *Welsh,* supra, so that it may take its place equally among the other constitutionally preserved freedoms vindicated by this Court.

A Public Welfare Fund

Specifically, the freedom of religion claim as explained above is here brought to bear upon a public welfare fund, and thus stands squarely under a line of cases which have consistently held that a federal citizen may not be barred from participation in public welfare funds by a requirement which constrains the exercise of a constitutionally guaranteed right. (*Everson, Sherbert, Shapiro,* supra.) That we here deal with a "public welfare fund" clearly flows from prior decisions. *Sherbert* dealt with unemployment compensation; *Shapiro* and *Graham* with public assistance payments, and *Everson* with school bus funding which was designated at p. 16 as public welfare legislation. In *Shapiro* the court specifically analogized school costs to the public welfare framework at p. 633:

> "It [the State] could not, for example, reduce expenditures for education by barring indigent children from its schools."

Stated summarily, the freedom claim rests squarely on the *Pierce* and *Yoder* decisions where the Court in *Yoder* stated:

> "However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children."

Coupled with this authority is that of *Abingdon School District v. Schempp* (1963), 374 U.S. 203, 233, where the Court stated the purpose of the free exercise clause and the threshold requirements to the raising of a free exercise claim:

> (The purpose of the free exercise clause) ". . . is to secure religious liberty on the individual by prohibiting any invasions thereof by civil authority. Hence, it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."

The coercive effect upon appellants of the tax distribution system complained of can be seen in the following hypothetical case. Suppose two Pennsylvania families each sending two children through the 12 years of elementary-secondary schooling: Family A elects to use the State school system, Family B a school (Muslim, Jewish, Christian) as dictated by religious conviction. Each family pays $750 a year in ad valorem and sales taxes, or $8,000 over the 12 year span. But Family B, by so electing, must pay more *in order to exercise its religious freedom.* Since the non-state option will cost on the order of $1,000 per child per year, Family B could well spend $24,000 + $8,000 while Family A spends $8,000. This occurs solely

because the State excludes Family B from the fund by virtue of that family's exercise of religious choice. Thus the choice is not freely exercised. Is this not clearly "hampering" to Family B? In *Everson* the Court declared:

> "On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it, from receiving the benefits of public welfare legislation.*" (Emphasis supplied.) (p. 16)

Note at this point that all citizens are to benefit from "public welfare legislation." (In this case school bussing.) Following *Everson* a situation arose in the case of *Sherbert v. Verner,* 374 U.S. 398 (1963),[7] in which Adell Sherbert, a Seventh Day Adventist, was denied unemployment compensation benefits because of her discharge due to refusal to work on Saturdays. The South Carolina Supreme Court had held that the denial of benefits:

> ". . . places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

In reversing the South Carolina Court, Mr. Justice Brennan said for the Court:

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[7] See appellants' analysis of the parallels between *Sherbert* and the instant case as developed at p. 24½ infra.

"The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. [p. 404]

It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. [p. 404]

In *Speiser v. Randall,* 357 U.S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment Freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. [p. 405]"

Can there be seen any basic distinction between the Seventh Day Adventist who is refused public funds because she won't work on Saturday and the Christian who is refused public funds to educate his child because he or she rejects state schooling? Both taxpayers pay into the fund in question. Both funds are expended for public welfare. Both taxpayers are denied participation because they are persuaded that their faith commitment demands of them conduct that varies in some particular from the customary or established pattern in society. Neither party offers a

threat to any public interest or to society at large by the particular right claimed. Hence, the argument from religious freedom requires review in its high position as a substantive federal question not heretofore considered by the Court. Brief mention must next be made of the prior cases which have been weighed by the Court.

Stare Decisis

This petition is not being made in ignorance of the manifold decisions of this Court that essentially hold that "public" monies cannot be used to subsidize "religious" causes.[8] However, it is that very formulation of Court-made law that contributes to the unconstitutional burden appellants carry and now complain of. And it is at this juncture that the prior "private school aid" cases are distinguished, for in none of them were involved:

1. A claim by taxpayer citizens to participate as of right in public welfare funds.

2. A claim that the state schools themselves inculcate religious values in their students.

As the Court pointed out in *Edelman*:

"Since we deal with a constitutional question we are less constrained by the principle of stare decisis than we are in other areas of the law."

At this juncture, then, appellants present to the Court a new question; not *whether* religion may be advanced by state action, but, rather *which* religion (humanism or some others) may receive state support, for the state has

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[8] *Meek v. Pittenger; Lemon v. Kurtzman, supra.*

procedurally admitted that it sponsors religious values. Hence, the legal ground of argument is shifted so that the Court can now review the question of whether or not a true pluralism will guide the state in its educational policies toward its citizenry. Appellants advert to *Sherbert,* supra p. 409, where the Court noted:

> "Extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences and does not represent that involvement of religious with secular institutions which it is the object of the Establishment clause to forestall."

This quotation arises from the complex of arguments reviewed in *Sherbert* which are analogized to the instant case in the table of comparison that follows.

ARGUMENT BY APPELLEE (INVALIDATED)	*COROLLARY*	*HOLDING FOR APPELLANT*	*COROLLARY*
I The South Carolina Supreme Court held specifically that Appellants ineligibility infringed none of her Constitutional liberties because the construction of the statute made by the Employment Security Commission "*places no restriction upon the Appellants freedom of religion nor ...*	The present tax structure places no *restriction* upon plaintiffs freedom of religion nor does it impair them in the exercise of their rights with respect to the education of their children because they are free to choose either the public school system or their own private schools.	"If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect". p. 404	Plaintiffs ineligibility for direct disbursement of school tax funds derives solely from the practice of their religion in the educational process, but the pressure of such ineligibility upon plaintiffs to forego procuring Christian Education for their children is unmistakable.
II *...does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her own conscience*" 240 S.C. 286; 303-304, 125 S.E. 2nd, 737, 746. (p. 401) (emphasis supplied)	Matters plaintiffs complain of are only an indirect result of welfare legislation which is within the Commonwealths' competence to inact no criminal or civil sanctions directly compel plaintiffs to attend public schools or to remain away from the Christian School.	"Here not only is it apparent that appellants declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable". P. 404	Such pressure forces plaintiffs to choose between following precepts of their religion and forfeiting public welfare benefits on the one hand and abandoning one of the precepts of their religion in order to receive benefits of the taxing pattern on the other hand. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against Appellant for her Saturday worship" (p. 404)
III unemployment compensation benefits are not appellant's "right" but merely a "privilege" (p. 404)	Public education is not a right of the plaintiffs but is merely a privilege, therefore they are not entitled as a matter of right to participate in the public education fund.	"It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (p. 404) (See further comment by the Court on Speiser vs. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2L. Ed.2nd 1460 as it appears at pages 405-406 in Sherbert.)	The tax structure complained of places conditions upon plaintiffs receipt of benefits; those conditions are to submit their children to educational perspectives repugnant to their faith while requiring economic support from plaintiffs which directly reduces plaintiffs ability to exercise their freedom under *Pierce* to finance education consistent with their faith. That such conditions are infringements upon plaintiffs liberties of religion and expression is as obvious as the handicap imposed.
IV "The appellees suggest no more *than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work*". (p. 407)	Public Education is a compelling state interest in the furtherance of the public welfare, therefore, whatever infringement of plaintiffs constitutional rights may exist in the tax structures complained of is justified by the nature of the interest the Commonwealth has in procuring satisfactory education for its citizens	"It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area "only the gravest abuses, endangering paramount interests, give occasion for permissible limitations." (p. 406) Citing *Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 323 89 LEd. 430.*	Neither the Commonwealths undeniable interest in education, nor its recent history of solely supporting defendants (and similar) systems suffice to justify infringements in this highly sensitive constitutional area. Only the gravest abuses of religious freedom, endangering the paramount interests of the Commonwealth may give reason for permissible limitations. See *Pierce v. Society of Sisters 268 U.S. 510 (1925).*
V To extend benefits to Sabbatarians fosters the establishment of the Seventh Day Adventist religion (p. 409)	To grant plaintiffs the relief they pray for would amount to an "establishment" of the Christian faith in education through the receipt of Commonwealth funds by the plaintiffs	Extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences and does not represent that involvement of religious with secular institutions which it is the object of the Establishment clause to forestall (p. 409)	Extension of educational tax proceeds to the plaintiffs in common with parents of children in public schools would reflect nothing more than the governmental obligation of neutrality in the face of religious differences, and would not represent the quality of involvement by the state in religious matters which it is the object of the Establishment Clause to forestall.

CONCLUSION

Thus it is entirely appropriate that certiorari should issue and the decision of the Third Circuit be reviewed.

Respectfully submitted,
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